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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Customs Court (R. 51–61) are reported in 59 Treas. Dec. 747 (T. D. 44758). The opinions of the Court of Customs and Patent Appeals (R. 63–113) are reported in 61 Treas. Dec. 1334 (T. D. 45773).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 20, 1932. (R. 113–114.) A petition for rehearing was denied October 10, 1932. (R. 114–115.) A petition for a writ of

certiorari was filed December 6, 1932, and was granted January 9, 1933. (R. 117.) The jurisdiction of this Court rests on Section 195 of the Judicial Code as amended by Section 647 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 762 (U. S. C. Sup. VI, Title 28, Sec. 308).

QUESTIONS PRESENTED

1. Whether, in importing merchandise from abroad, the University of Illinois is an instrumentality of the State of Illinois engaged in a governmental function.

2. If the University of Illinois is such an instrumentality, whether it may recover the amount of customs duties paid on the articles imported by it, on the ground that the exaction of the duties is prohibited by the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix A, *infra,* pp. 38–40.

STATEMENT

In 1927 and 1928 the petitioner purchased certain property in Germany, Great Britain, and Holland and imported it into this country. The property consisted of chemical glassware, an electric machine and parts, an optical instrument, and certain other scientific apparatus. (R. 15, 17, 19, 21–22.)

The Collector of Customs assessed duties upon the property so imported at the rate prescribed by the Tariff Act of 1922. The petitioner paid the duties assessed, and filed protests with the Collector of Customs. After a hearing, the Customs Court overruled the protests and entered judgment for the Government. (R. 61.) On appeal to the Court of Customs and Patent Appeals, that court, with two judges dissenting, affirmed the judgment of the Customs Court. (R. 113–114.)

Certain additional facts relating to the status of the University of Illinois appear in the Argument.

SUMMARY OF ARGUMENT

I

The power of Congress over foreign commerce is not subject to any implied exception in favor of the States, and includes the unqualified power to impose a protective tariff. There is no express provision of the Constitution upon which the petitioner may rely in support of its contention that an instrumentality of the State may import merchandise from abroad without the payment of customs duties. If such an exemption exists, it must be implied.

The Constitution expressly confers upon Congress the power to "regulate Commerce with foreign Nations." It is, of course, a matter of history that one of the purposes sought to be achieved through the Constitution was the establishment of

a single authority with untrammeled and exclusive power over the regulation of foreign commerce. This Court has held in a long line of decisions that the power of Congress over foreign commerce is without restriction. In *Buttfield* v. *Stranahan,* 192 U. S. 470, 493, this Court said the power was "exclusive and absolute."

Congress may exercise this plenary power over foreign commerce for the purpose of protecting American industries; and this purpose it may accomplish through the levying of duties in a tariff. The power of Congress to regulate foreign commerce through a protective tariff was sustained in *Hampton & Co.* v. *United States,* 276 U. S. 394.

It can not be denied that the Tariff Act of 1922 involves an exercise by Congress of this power to regulate foreign commerce. The fact that the regulation takes the form of a duty and thus operates to raise revenue does not negative the fact that it is also a regulation of commerce and may be sustained as such. That the regulation is valid although it takes the form of a tax seems necessarily to follow from the decisions holding that the power to regulate foreign commerce includes the power to prohibit the importation of any article.

Even if the exaction in this case could not so clearly be sustained as a regulation of foreign commerce, it would not necessarily follow that it was unconstitutional. The present case involves not an internal matter over which concurrent power has

been given and reserved, but the matter of duties on imports. The Constitution not only expressly gives Congress power to collect such duties, but it expressly denies the power to the States. When the States ratified the Constitution, therefore, they expressly surrendered to the general Government all power which they formerly had in this field.

II

The power of Congress to regulate foreign commerce has for many years been exercised by the imposition of duties on articles imported by States and their instrumentalities. The practical construction of the Constitution on this question is clear and convincing. It is apparent from Acts of Congress, decisions of courts, decisions of the Board of General Appraisers, rulings of the Treasury Department, and the long continued acquiescence in the collection of duties on the part of the State officials.

It has been the uniform practice of the Treasury Department for a great many years not to exempt imports by States or State instrumentalities if they were otherwise taxable under the Tariff Acts. There are many published Treasury rulings in which property imported by a State or by an instrumentality of the State has been held dutiable. In other Treasury rulings such imports have been held entitled to free entry, but the claim for free entry was based on a construction of the statute

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and not on constitutional grounds. These rulings are set forth in Appendix C (*infra*, pp. 47–67). They began as early as 1875 and have continued without interruption until the present time. The earliest reference in the records of the Treasury Department to a claim of constitutional exemption appears in 1924. Thus, for 135 years after the adoption of the Constitution, the officials of the States did not question the constitutional power of Congress to impose duties on their imports. This uniform and long continued practical construction of the Constitution is of great weight in its interpretation.

III

The power of Congress to regulate foreign commerce is conferred by the Constitution without qualification. Our argument that no exception is to be implied in behalf of the States is supported by decisions with respect to other powers granted to Congress in the Constitution.

The closest analogy to the power to regulate foreign commerce is, of course, the power to regulate interstate commerce. It seems to be well settled that a State engaging in interstate commerce is not exempt from the regulatory power of Congress. There are several decisions in the lower Federal courts in which it has expressly been held that a State or municipally-owned railroad is subject to Federal regulation. Equally significant is the fact

that State or municipally-owned railroads have often submitted to the jurisdiction of the Interstate Commerce Commission without question.

Another analogy is to be found in the power given to Congress to make "uniform Laws on the subject of Bankruptcies." There is no constitutional exception in favor of the States with respect to this power. The bankruptcy laws apply to the claims of a State. It has apparently never been contended that Congress has no power under the Constitution to effect such claims through the power to enact bankruptcy laws.

IV

In *South Carolina* v. *United States,* 199 U. S. 437, this Court held that the Constitution did not prevent the United States from imposing a license tax on the sale of liquor by the State of South Carolina. The reasoning upon which this decision was based is largely applicable here. The Court in its opinion specifically referred to the question of import duties, and called attention to the fact that if a State were exempt from the payment of these duties "it could undersell all individuals and so monopolize the importation and sale of foreign goods."

The States are already large purchasers of materials and merchandise. If a State may import foodstuff for its penitentiaries and other institutions, supplies of all kinds for its libraries and uni-

versities, brick and cement and building materials for its highways and public buildings, it is obvious that the effect on domestic producers and on the national revenues will be serious.

Even if it be conceded that education is a governmental function, it by no means follows that university education must be so regarded. In maintaining a university the State enters into competition with similar institutions conducted privately. It does not clearly appear that the University of Illinois is a strictly governmental function of the State of the same class as the maintenance of its courts, penitentiaries, police departments, fire departments, and similar activities which can be carried on solely by the State or one of its political subdivisions.

Moreover, the University of Illinois since its creation has received large sums of money from the Federal Treasury at various times. The duties involved in this case aggregate about one-fifth of one per cent of the amount received by the University from the United States during the two years when the goods in question were imported. The University is in no position to contend that it is being burdened by the Federal Government as long as the contributions received by it from the United States exceed the duties imposed.

ARGUMENT

I

THE POWER OF CONGRESS OVER FOREIGN COMMERCE IS NOT SUBJECT TO ANY IMPLIED LIMITATION IN FAVOR OF THE STATES. IT INCLUDES THE POWER TO IMPOSE A PROTECTIVE TARIFF, AND THE STATES ARE NOT EXEMPT FROM THE PAYMENT OF DUTIES UNLESS CONGRESS SO DECLARES

There is no language in the Constitution to support the contention that an agency or instrumentality of a State may import merchandise from abroad free of duty imposed by Federal statute. Such exemption, if it exists at all, must exist by implication. This Court has never recognized any such implied immunity, and we contend that the Constitution itself precludes any such implication because of its grant to Congress of paramount and plenary control over foreign commerce.

The third paragraph of Section 8 of Article I of the Constitution (*infra*, p. 38) provides that Congress shall have power—

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

It is, of course, a matter of history that this grant of power to the Federal Government was one of the great purposes sought to be achieved by the adoption of the Constitution. It was quite obviously necessary to establish a single authority with untrammeled and exclusive power over the regulation of foreign commerce. This was clearly recognized in the Constitutional Convention and in

the contemporaneous discussion of the proposed Constitution. (Appendix B, *infra,* pp. 41–46.)

This Court at an early date in *Gibbons* v. *Ogden,* 9 Wheat. 1, considered the commerce clause of the Constitution, and that case is the beginning of a long line of decisions holding that the power of Congress over foreign commerce is without restriction. In *Gibbons* v. *Ogden* this Court, through Chief Justice Marshall, said (p. 193) that—

> these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.

The power to regulate foreign commerce, the Chief Justice said (pp. 196–197)—

> is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Although later decisions have shown that the power of Congress over interstate commerce is subject to some limitations (see *Hammer* v. *Dagenhart*, 247 U. S. 251), these limitations do not extend to the power to regulate commerce with foreign nations and with the Indian tribes. This has been conceded even by those who sought to impose restrictions on the power to regulate interstate commerce. See Fuller, C. J., dissenting in the *Lottery Case*, 188 U. S. 321, 374. In *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, this Court said that—

> Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

The unqualified nature of the power of Congress over foreign commerce was made the basis of the decision in *Buttfield* v. *Stranahan*, 192 U. S. 470. The Court said (pp. 492–493):

> Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo

> statutes, but indirectly as a necessary result of provisions contained in tariff legislation. * * *
>
> The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey,* 93 U. S. 188, 194, as exclusive and absolute, * * *.
>
> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.

Other decisions to the same effect are *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 334; *The Abby Dodge,* 223 U. S. 166, 176. *Brolan* v. *United States,* 236 U. S. 216, 218; *Weber* v. *Freed,* 239 U. S. 325, 329. Cf. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434.

Congress may exercise this plenary power over foreign commerce for the encouragement and protection of American industries, and this purpose may be accomplished by levying duties upon the products of foreign countries not for the sake of revenue but to exclude from our markets the competition of foreign goods. *Hampton & Co.* v. *United States,* 276 U. S. 394, 411. Cf. *Alaska Fish*

Co. v. *Smith,* 255 U. S. 44, 48. In the second statute enacted by the First Congress of the United States (Act of July 4, 1789, c. 2, 1 Stat. 24), duties were laid upon imports "for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures." Duties levied for protection were thus approved by a Congress which included in its membership many of the members of the Constitutional Convention. See also the letter of James Madison, *infra,* p. 42. The constitutionality of a protective tariff was not raised in Congress until the debate on the high tariff of 1824. 1 Stanwood, *American Tariff Controversies,* 293–294. The proponents of the tariff founded their arguments on the power to regulate foreign commerce.[1] The power of Congress thus to exercise its power to regulate foreign commerce was supported by many eminent authorities.[2] Although

[1] In reply to Mr. Barbour of Virginia (afterwards Mr. Justice Barbour), Mr. Clay said (Annals of Congress, March 31, 1824, p. 1994):

"The gentleman from Virginia has, however, entirely mistaken the clause of the Constitution on which we rely. It is that which gives to Congress the power to regulate commerce with foreign nations. The grant is plenary, without any limitation whatever, and includes the whole power of regulation, of which the subject to be regulated is susceptible."

[2] See 2 Story, Commentaries on the Constitution, Secs. 1077–1095, and the material collected at pp. 138–153 of the brief for the United States in *United States* v. *Realty Company,* 163 U. S. 427, Nos. 869, 870, October Term, 1895. See also 1 Stanwood, *American Tariff Controversies,* c. IX;

the power was questioned for some time, it has now "passed beyond the range of controversy." 2 Willoughby, *Constitutional Law,* 680.

It can not be denied that the Tariff Act of 1922, under which the duties in question were imposed, involves an exercise by Congress of its power to regulate foreign commerce, and specifically of its power so to regulate foreign commerce as to encourage American industries. The statute is designated in its title as "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." The grant of power to Congress to impose a protective tariff would be largely futile if the States might import from abroad as they chose without regard to the regulation imposed on foreign commerce by the will of Congress. To apply the argument specifically, if Congress chooses to encourage the production in America of scientific apparatus and scientific glassware of the type used in universities, by imposing protective duties upon such imports, its purpose will be frustrated if the States may import such things free of duty. *South Carolina* v. *United States,* 199 U. S. 437, 455.

The fact that the regulation lays a charge as upon imported merchandise and thus results in revenue does not negative the fact that it is a regulation of commerce and must be treated as an exer-

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Winston, *The Tariff and the Constitution*, 5 Journal of Political Economy 40; Cahill, Curtis and Backworth, *Is a Protective Tariff Constitutional?*, 1 Mich. L. J. 348.

cise of the power to regulate.[3] It is established by *Veazie Bank* v. *Fenno,* 8 Wall. 533, that regulation may take the form of taxation. In that case one of the grounds on which a tax on the issue of State bank notes was sustained was the power of Congress to protect the national currency. See also *Head Money Cases,* 112 U. S. 580, 595–596.

That the regulation is valid although it takes the form of a tax seems necessarily to follow from the decisions holding that the power to regulate foreign commerce includes the power to prohibit the importation of any article. *Buttfield* v. *Stranahan,* 192 U. S. 470; *Brolan* v. *United States,* 236 U. S. 216; *Weber* v. *Freed,* 239 U. S. 325. At an early date, the power of Congress to regulate foreign commerce was exercised by a complete embargo on all foreign commerce. Act of December 22, 1807, c. 5, 2 Stat. 451, as supplemented by the Act of January 9, 1808, c. 8, 2 Stat. 453. This statute was assailed on the ground that the power to regulate foreign commerce did not include the power to prohibit it; but the statute was sustained in *United*

[3] See 2 Story, Commentaries on the Constitution, Secs. 1080, 1081, 1088. In Section 1088, Mr. Justice Story wrote, in connection with this question, that "revenue is an incident to such an exercise of the power. It flows from, and does not create the power. It may constitute the motive for the exercise of the power, just as any other case may; as, for instance, the prohibition of foreign trade, or the retaliation of foreign monopoly; but it does not constitute the power."

States v. *The Brig William,* 2 Hall Law J. 255, Fed. Cas. No. 16700 (D. Mass.). See 2 Story, Commentaries on the Constitution, Secs. 1290, 1292; 1 Kent, Commentaries, 431–432. This power has been exercised in many subsequent Acts of Congress, including Sections 305, 306, and 307 of the Tariff Act of 1922. It could scarcely be contended that a State remained free under the Constitution to import articles from abroad against which Congress had placed a specific embargo or prohibition. This Court has held that the power of Congress over foreign commerce is "exclusive and absolute." *Buttfield* v. *Stranahan,* 192 U. S. 470, 493. Since Congress may forbid the importation entirely as a regulation of commerce, it may likewise regulate commerce by allowing the importation subject to a duty. It has already been shown that a regulation of commerce is no less a regulation because it takes the form of a duty. The power to destroy includes the power to tax.

The general rule of concurrent immunity from taxation established by such cases as *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Collector* v. *Day,* 11 Wall. 113, arises from the implied limitation upon the power of either the States or the Nation to impose the burden of taxation upon the exercise of sovereign powers reserved to the States or

granted to the United States by the Constitution. But the States reserved no power with reference to the importation of merchandise, and none may be implied in derogation of the constitutional power of Congress. The Constitution not only expressly gives to Congress the power to lay and collect duties and imposts (Article I, Sec. 8, par. 1; *infra*, p. 38) but the States are expressly forbidden to "lay any Imposts or Duties on Imports or Exports," with exceptions which are not material here (Article I, Sec. 10, par. 2; *infra*, p. 38). The Constitution itself thus makes plain the purpose to confer upon the Federal Government the exclusive and plenary power to lay and collect duties on imports. When the States ratified the Constitution they expressly surrendered to the general Government all power which they formerly had in this field, subject to a qualification which serves only to emphasize the completeness of the grant.

The tax involved in *McCulloch* v. *Maryland*, 4 Wheat. 316, was a discriminatory tax; it was levied only on banks not chartered by the State. There was only one bank which met this description, the Bank of the United States, which this Court held to be a Federal instrumentality. Obviously the unrestricted power to levy a discriminatory tax is the power to destroy. But the plenary power to regulate foreign commerce, including the power to prohibit as well as to tax, if exercised without

discrimination may not be challenged as destructive of the States and their instrumentalities of Government.

Further support for the correctness of these conclusions is found, we believe, in (1) the long continued practical construction of the Constitution with respect to the power of Congress to collect duties on State imports, (2) by the analogy of decisions under other clauses of the Constitution, and (3) by considerations derived from this Court's decisions in *South Carolina* v. *United States,* 199 U. S. 437.

II

PRACTICAL CONSTRUCTION

The power of Congress to regulate foreign commerce has for many years been exercised by the imposition of duties on articles imported by States and their instrumentalities. The practical construction of the Constitution on this question is clear and convincing. It is apparent from the Acts of Congress, the decisions of courts, decisions of the Board of General Appraisers (now the Customs Court), rulings of the Treasury Department, and the long continued acquiescence in the collection of duties on the part of State officials.

This Court recently decided that—

> practical construction, long continued, of the constiutional provisions * * * should be taken as fixing the meaning of those provisions, if otherwise doubtful.

McGrain v. *Daugherty*, 273 U. S. 135, 174. The same result has been reached in many other cases involving the construction of the Constitution. *Hampton & Co.* v. *United States*, 276 U. S. 394, 412; *Myers* v. *United States*, 272 U. S. 52, 175; *Knowlton* v. *Moore*, 178 U. S. 41, 92; *Ames* v. *Kansas*, 111 U. S. 449, 469; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Stuart* v. *Laird*, 1 Cranch 299, 309.

Statutes

The understanding of Congress that articles imported by a State were not constitutionally immune from customs duties seems evident from the provisions of paragraphs 1530 and 1706 of the Tariff Act of 1922 (*infra*, pp. 39–40). Paragraph 1530 provides that "any State or public library" may import books for its own use free of duty. Paragraph 1706 provides for the free importation of certain merchandise to be used "for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, agriculture, or education, or for a municipal corporation," and also for any like merchandise imported "by any society or association, or for a municipal corporation, for the purpose of erecting a public monument." If Congress had believed that importations by a State or municipality were constitutionally exempt from customs duty, the references to State libraries and to States and municipalities in these paragraphs of the statute would obviously have been useless.

Similar provisions are included in paragraphs 1631 and 1809 of the Tariff Act of 1930. In the library paragraph the reference to State libraries first appeared in paragraph 413 of the Act of August 27, 1894, although earlier Acts had exempted imports by educational institutions. The provision contained in paragraph 1706 of the Tariff Act of 1922 had its origin in paragraph 702 of the Act of July 24, 1897. Both paragraphs have been included in all subsequent Tariff Acts.[4]

Court Decisions

There are at least five court decisions, prior to the present case, involving duties on articles imported by or for a State instrumentality. In none of these cases was any question raised as to the constitutional power of the United States to impose the duties. The sole question in each case was one

[4] Scientific and philosophical apparatus and instruments were accorded free entry under Section 1 of the Act of August 10, 1790, c. 39, 1 Stat. 180, and remained on the free list until July 14, 1862, when they were made dutiable, at the rate of 10 per cent ad valorem. Under the Act of June 30, 1864, the rate on such merchandise was increased to 15 per cent. By the Act of July 14, 1870, such merchandise was returned to the free list when imported for use by an incorporated body for religious, philosophical, or educational purposes, and not for sale. This exemption was continued by the Acts of October 1, 1890, August 27, 1894, July 24, 1897, August 5, 1909, and October 3, 1913. The exemption was removed, however, by the Tariff Act of 1922, and by the Tariff Act of 1930, so that such merchandise is now made dutiable regardless of the purpose for which it is imported.

of the proper application of the statute. In *Little* v. *United States,* 104 Fed. 540 (C. C. D. Vt.), books imported for State law libraries in Maine were held entitled to free entry. In *University of Missouri* v. *United States,* reported only in a memorandum in T. D. 26641, 10 Treas. Dec. 135 (C. C. E. D. Mo., 1904), a decision of the Board of General Appraisers was reversed and certain articles imported by the University of Missouri were held to be free of duty as scientific apparatus. In *Eimer* v. *United States,* reported only in T. D. 27089, 11 Treas. Dec. 213 (C. C. S. D. N. Y., 1906), merchandise imported for the University of Wisconsin was held not entitled to free entry because of a failure to comply with the regulations. In *United States* v. *Wyman & Co.,* 2 Ct. Cust. App. 440, an iron cylinder containing acid, imported for the University of Kansas, was held free of duty since it was the ordinary covering of scientific material entitled to free entry. In *United States* v. *Kastor & Bros.,* 6 Ct. Cust. App. 52, scissors imported for use in domestic science classes in the New York City schools were held entitled to free entry as scientific apparatus. See also 21 Op. A. G. 301.

Departmental Practice

An examination of the practice of the Treasury Department shows that it has been the uniform practice for a great many years not to exempt imports by States or State instrumentalities if they were otherwise taxable under the Tariff Acts. The

Customs Regulations have never provided that imports by a State are immune from taxation, although these regulations have for many years included provisions allowing the entry of articles imported for the personal use of foreign ministers or ambassadors and of articles sent by a foreign government for its use to an agent in this country. See, for example, Articles 366 and 367 of the Customs Regulations for 1874. The Customs Regulations formerly made provision for free entry of articles imported for the use of the United States. This was in accord with requirements of the Tariff Acts through 1894. These provisions were omitted in the Tariff Act of 1897 and subsequent Acts, and articles imported by or for the United States are now subject to the payment of customs duties.

Although the earlier Customs Regulations contained no provision which stated in express terms that articles imported by a State would be subject to customs duties, Article 369 of the Customs Regulations of 1874 contained the following paragraph:

> Articles imported for the use of a person performing a public duty or service, although useful and appropriate to such service, cannot, if otherwise dutiable by law, be exempted from duty, unless it be shown that the article was ordered by an authorized agent of the Government, and is imported as the property of the United States.

There are numerous published Treasury rulings in which property imported by a State or by an instrumentality of a State has been held dutiable.

In other Treasury rulings such importations have been held entitled to free entry, but the claims for free entry were based on construction of the applicable statute and not on constitutional grounds. Many of these rulings are set forth in Appendix C (*infra*, pp. 47–67). They begin as early as 1875 and continue without interruption to the present time. Since *Collector* v. *Day*, 11 Wall. 113, was not decided until 1871, the question would hardly have arisen before that time.

No question concerning the constitutional power of the United States to tax imports by a State or an instrumentality of a State has been found in any published ruling or decision earlier than 1925, when the application of the University of Michigan for a refund of duties on the ground that the Constitution forbade their exaction was denied by the Board of General Appraisers. Abstract 50335, 48 Treas. Dec. 728. The earliest reference to the constitutional question which has been found in the unpublished correspondence of the Treasury Department is in a letter written by Assistant Secretary Moss to an Assistant Attorney General of Maryland on March 7, 1924. (*Infra*, pp. 62–63.) It thus appears that for 135 years after the adoption of the Constitution the officials of the States did not question the constitutional power of Congress to impose duties on their imports, and did not even think the matter doubtful enough to warrant an application to the Treasury for a ruling.

There has thus been a long-continued and uniform practical construction of the Constitution which should be of great weight in its interpretation.

III

ANALOGIES WITH OTHER POWERS GRANTED TO CONGRESS BY THE CONSTITUTION

The power of Congress to regulate foreign commerce is conferred by the Constitution without qualification. Our argument that no exception is to be implied in favor of the States is supported by decisions with respect to other powers granted to Congress in the Constitution.

Interstate Commerce

The closest analogy to the power to regulate foreign commerce is of course the power to regulate interstate commerce. Although the two powers are conferred in the same clause of the Constitution, the power over interstate commerce is subject to limitations which are not applicable to the regulation of foreign commerce. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434; *Brolan* v. *United States,* 236 U. S. 216, 222; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492; Fuller, C. J., dissenting, in the *Lottery Case,* 188 U. S. 321, 374. Decisions sustaining the exercise by Congress of its power to regulate interstate commerce are therefore applicable *a fortiori* to the exercise by Congress of its power to regulate foreign commerce.

Although the matter has never been precisely determined by this Court, it seems to be well settled that a State engaging in interstate commerce is not exempt from the regulatory power of Congress. In *South Carolina* v. *United States,* 199 U. S. 437, 454, this Court referred to the possibility of public ownership of "the entire railroad system," and used this as a basis for its decisions that the States are not exempt from Federal taxation when they engage in proprietary activities. Similarly, in *Georgia v. Chattanooga,* 264 U. S. 472, 481, this Court referred to the State ownership of land in another State for railroad purposes as a "private undertaking."

There are several decisions in the lower Federal courts in which it has expressly been held that a State or municipally-owned railroad is subject to Federal regulation. In *McCallum* v. *United States,* 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, it was held that the State Belt Railroad, a railroad engaged in interstate commerce in and around San Francisco, and owned and operated by the State of California, was subject to the provisions of the Federal Safety Appliance Act. The same result was reached in *Tilden* v. *United States,* 21 F. (2d) 967 (C. C. A. 9th). In *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. S. C.), it was held that the Port Utilities Commission Railroad of Charleston, owned and operated by the city of Charleston, South Carolina, was subject to the provisions of the Federal Employers

Liability Act. Cf. *Sherman* v. *United States,* 282 U. S. 25.

Equally significant is the fact that State or municipally-owned railroads have often submitted to the jurisdiction of the Interstate Commerce Commission without question. In *Wharfage, Handling, and Storage Charges at Municipal Terminals, Norfolk, Va.,* 59 I. C. C. 488, it appeared that the city of Norfolk had filed with the Interstate Commerce Commission schedules of charges for services rendered at municipal terminals. These schedules were stricken from the Commission's files, not because of any immunity from regulation, but because the city was furnishing only a warehouse service which did not constitute interstate commerce. In *New Orleans Public Belt Railroad Construction,* 166 I. C. C. 761, the New Orleans Public Belt Railroad, owned by the city of New Orleans, applied for and obtained authority from the Commission to construct an extension of its line. The Commission referred to the railroad as "a carrier by railroad subject to the interstate commerce act." An application by the city of New Orleans for authority to issue bonds for the benefit of the same railroad was made and granted in *New Orleans Public Belt Railroad Bridge Bonds,* 189 I. C. C. 156. See also *California Canneries Co.* v. *Southern Pacific Co.,* 51 I. C. C. 500, 502–503.

Another example of this practical construction of the commerce clause appears in the Act of Feb-

ruary 17, 1917, c. 84, 39 Stat. 922 (U. S. C., Title 49, Sec. 53; *infra,* p. 39). This Act relates to the Cincinnati Southern Railroad, which is wholly owned by the city of Cincinnati. In 1881 the city leased the railroad to a company which is now a part of the Southern Railroad system. The lease contained a provision to the effect that the trustees of the Cincinnati Southern Railroad should be provided with annual free passes and be furnished with a car for the purpose of inspection. This provision of the lease was observed until 1912, when the Interstate Commerce Commission ruled (Conference Ruling No. 355, of April 8, 1912) that the trustees were in effect directors of a nonoperating company, and as such were not entitled to free transportation over the leased railroad.

The city of Cincinnati apparently made no suggestion that its railroad was not subject to the congressional power to regulate interstate commerce. It recognized the power of Congress and obtained the enactment of the Act of February 17, 1917, *supra,* allowing the issuance of passes to the trustees, officers, and agents of the Cincinnati Southern Railroad for use on business of the company. See House Report No. 973, 64th Cong., 1st Sess.; Senate Report No. 1034, 64th Cong., 2d Sess.; 53 Cong. Rec., Part 13, pp. 13931–13932; 54 Cong. Rec., Part 3, p. 3063.

Other examples of the exercise by Congress of its paramount power under the commerce clause which necessarily interfere with the free activity

of the States readily suggest themselves. Would an officer of a State who transported lottery tickets in interstate commerce be immune from the provisions of Section 237 of the Criminal Code (U. S. C., Title 18, Sec. 387) on the ground that the constitutional power of Congress over interstate commerce is subject to an implied exemption in favor of a State which conducts its own lotteries?

Perhaps the most recent congressional regulation of interstate commerce which affects State activity is the Act of January 19, 1929, c. 79, 45 Stat. 1084 (U. S. C. Sup. VI, Title 49, Sec. 65) which divests convict-made goods of their interstate commerce character when transported into any State or Territory. Since convicts are necessarily State charges, this statute is obviously primarily a regulation of State activity. But no suggestion seems ever to have been made that the statute is unconstitutional. See Senate Report No. 344, 70th Cong., 1st Sess.; House Report No. 897, 70th Cong., 1st Sess.

Immigration of Aliens

Another analogy is found in the power of Congress with respect to aliens. It is, of course, well settled that Congress may regulate or forbid the immigration of aliens. The immigration of aliens involves foreign commerce, and the power of Congress rests, at least in part, on its power to regulate foreign commerce. *Head Money Cases,* 112

U. S. 580, 591–594. *United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 290. It could scarcely be contended that the power of Congress in this field is subject to an implied exception in favor of the States, and that a State might freely bring in aliens without regard to the laws of Congress, such, for instance, as that forbidding the immigration of contract labor. In fact, there are rulings on this precise question which have never been challenged. 26 Ops. A. G. 180; 26 Ops. A. G. 410; see 27 Ops. A. G. 479.

Bankruptcy

The Constitution gives Congress power to make "uniform Laws on the subject of Bankruptcies throughout the United States." If the power to regulate foreign commerce is subject to an implied exception in favor of the States, there would seem to be no reason why there should not be a similar exception with respect to the power of Congress over bankruptcy. But there is no such exception. The bankruptcy laws apply to the claims of a State. If a State claim for taxes is not filed within the time prescribed under the bankruptcy law it is barred. *People of the State of New York* v. *Irving Trust Co.,* No. 304, October Term, 1932, decided February 13, 1933.

Section 57 (j) of the Bankruptcy Act provides that debts owed to a State as a penalty or forfeiture shall not be allowed in bankruptcy, except for the

amount of the actual loss. This provision was applied against a State in *People of the State of New York* v. *Jersawit,* 263 U. S. 493. Other applications of the Bankruptcy Act against State claims may be found in *Commonwealth of Pennsylvania* v. *York Silk Mfg. Co.,* 192 Fed. 81 (C. C. A. 3d); *In re Abramson,* 210 Fed. 878 (C. C. A. 2d); *In re Brown,* 41 F. (2d) 228 (S. D. Ohio). Although it is sometimes said that the Bankruptcy Act should not be construed to apply against a State in the absence of a specific reference to State claims, it has apparently never been contended that Congress has no power under the Constitution to affect State claims through the power to enact bankruptcy laws. See also *Spokane County* v. *United States,* 279 U. S. 80, and *People of the State of New York* v. *Maclay,* No. 374, October Term, 1932, decided February 6, 1933, sustaining the power of Congress to require priority of payment of debts owing to the United States over debts due the States in the settlement of estates administered under insolvency laws of the States.

Another analogy is offered by the constitutional authority given Congress to grant patents and copyrights. This power, like the power to regulate foreign commerce, is one which is given exclusively to Congress and may not be exercised by the States. Although no decisions on the question are known, it could scarcely be contended that the power to grant patents and copyrights is subject to an implied constitutional exception in favor of the

States, and that a State might freely use a patented or copyrighted article.

IV

SOUTH CAROLINA *v.* UNITED STATES, 199 U. S. 437

In *South Carolina* v. *United States,* 199 U. S. 437, this Court held that the Constitution did not prevent the United States from imposing a license tax on the sale of liquor by the State of South Carolina. The reasoning upon which this decision was based seems directly applicable here. In its opinion this Court said (pp. 454–455, 457):

> The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co., No. 1,* 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.
>
> More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into

possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the

> Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. * * *
>
> * * * * *
>
> Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.

It is significant that the Court in its opinion specifically referred to the question of import duties and called attention to the fact that if a State were exempt from the payment of customs duties, "it could undersell all individuals and so monopolize the importation and sale of foreign goods." The question is directly involved in this case. If the States are entitled under an implied exemption in the Constitution to import free of duty any kind of merchandise used by them or by any of their agencies or instrumentalities, it is obvious that the national revenues would be threatened, and Federal control over foreign commerce would be weakened. Although there is not yet an approach to complete State socialism (cf. *Green* v. *Frazier,* 253 U. S. 233), the States are all large purchasers of materials and merchandise. These include foodstuffs for penitentiaries and other institutions,

supplies of all kinds for libraries and universities, brick and cement for public highways, and building materials for public buildings. If a State may import any of these articles free of duty, it is obvious that the effect on domestic producers and on the national revenues will be serious. That this danger is not purely imaginary, is evidenced by correspondence referred to in Appendix C (*infra*, pp. 57, 61–62) between the Governor of Louisiana and the Secretary of the Treasury in 1922, in which the Governor sought free entry of cement and other material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges.

It is common knowledge that great quantities of food and clothing must be distributed in such times as these to relieve distress and that if other means fail Municipal and State agencies must administer such relief. It would be surprising to the members of Congress to learn that such agencies may import food and clothing free of duty for such purposes.

Even if it be conceded that education is a governmental function, it by no means follows that university education must be so regarded. It is clear that higher education was not a function of government in 1789 when the Constitution was adopted. At that time there were no State universities, and education beyond that of the most elementary sort

was wholly a private enterprise. If a State chooses to invade a field of endeavor long occupied by private individuals and private corporations, it may well be argued that such a step does not transform the State's activity into a governmental function. In maintaining a university, the State enters into competition with similar institutions conducted privately.

The University of Illinois does not derive its sole support from the State. It receives an income of over $800,000 a year from students as charges for tuition and laboratory fees. (R. 35–37.) These students come not only from the State of Illinois, but from nearly every State in the Union and from many foreign countries. (R. 37.) It can hardly be said to be a governmental function of the State of Illinois to educate students from other States and other countries.

Many of the activities of the University of Illinois are in direct competition with private enterprise. One of its divisions is the University of Illinois Press, which prints, publishes, and sells books to the public in the same manner as a private publishing house.

In the light of these facts it does not clearly appear that the University of Illinois is a strictly governmental instrumentality of the State of Illinois of the same class as its courts, penitentiaries, police departments, fire departments, and similar agencies.

There is another fact in connection with the University of Illinois which seems to us to cast considerable doubt on its claim for exemption in this case. The University of Illinois was made possible by a land grant by the Congress of the United States. Act of July 2, 1862, c. 130, 12 Stat. 503, accepted by the Legislature of Illinois, Ill. Laws, 1863, p. 64. Since its creation the University of Illinois has received large sums of money from the Federal Treasury at various times.[5]

Under these various Acts of Congress the contribution of the Federal Government to the University of Illinois during the fiscal years 1927 and 1928 amounted to $783,733.00.[6] The goods involved in

[5] See the Hatch Act, Act of March 2, 1887, c. 314, 24 Stat. 440; the Morrill Act, Act of August 30, 1890, c. 841, 26 Stat. 417; the Adams Act, Act of March 16, 1906, c. 951, 34 Stat. 63; the Nelson Act, Act of March 4, 1907, c. 2907, 34 Stat. 1256, 1281; the Smith-Lever Act, Act of May 8, 1914, c. 79, 38 Stat. 372; the Smith-Hughes Act, Act of February 23, 1917, c. 114, 39 Stat. 929; and the Purnell Act, Act of February 24, 1925, c. 308, 43 Stat. 970.

[6] Land-Grant Colleges and Universities (Department of the Interior, Bureau of Education, Bulletin, 1928, No. 14), p. 58, shows that the Federal contribution to the University of Illinois for the year ended June 30, 1927, was $386,736. The same report for the year ended June 30, 1928 (Department of the Interior, Bureau of Education, Bulletin, 1929, No. 13) p. 62, gives the figure for that year as $396,997. The total for the two years is thus $783,733. This sum includes interest on the land-grant fund of 1862, in the amount of $32,450.66, for each of the two years involved. (See Bulletin, 1928, No. 14, p. 36; Bulletin, 1929, No. 13, p. 40.) If this interest is deducted the balance amounts to $708,832. See also R. 39.

this case were imported in 1927 and 1928. The duties imposed aggregate $1,603.75, about one-fifth of one per cent of the amount received by the University from the United States during the two years. We submit that the University is in no position to contend that it is being burdened by the Federal Government as long as the contributions received by the University from the United States exceed the duties imposed.

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

ARTICLE I

* * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * *

SECTION 10. * * *

* * * * *

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

* * * * *

ARTICLE VI

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES

The Act of February 17, 1917, c. 84, 39 Stat. 922 (U. S. C., Title 49, Sec. 53), provides as follows:

> That nothing contained in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, or the Acts amendatory thereof, shall be so construed by the Interstate Commerce Commission, or by the courts, as to prevent the lessee of the Cincinnati Southern Railway from complying with its obligation assumed in leasing said railway to furnish free transportation to the trustees of said Cincinnati Southern Railway, their officers and agents: *Provided,* That the free transportation referred to shall be furnished only when persons entitled thereto are traveling on the business of the company.

The Tariff Act of 1922, c. 356, 42 Stat. 858, 925, 934 (U. S. C., Title 19, Sec. 122), contains the following provisions:

> PAR. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement

of the fine arts, or any college, academy, school, or seminary of learning in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etching, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

* * * * *

PAR. 1706. Works of art, collections in illustration of the progress of the arts, sciences, agriculture, or manufactures, photographs, works in terra cotta, parian, pottery, or porcelain, antiquities and artistic copies thereof in metal or other material, imported in good faith for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, agriculture, or education, or for a municipal corporation, and all like articles imported in good faith by any society or association, or for a municipal corporation, for the purpose of erecting a public monument, and not intended for sale nor for any other purpose than herein expressed; but bond shall be given, under such rules and regulations as the Secretary of the Treasury may prescribe, for the payment of lawful duties which may accrue should any of the articles aforesaid be sold, transferred, or used contrary to this provision, and such articles shall be subject at any time to examination and inspection by the proper officers of the customs: *Provided*, That the privileges of this and the preceding paragraph shall not be allowed to associations or corporations engaged in or connected with business of a private or commercial character.

APPENDIX B

RECORDS OF THE CONSTITUTIONAL CONVENTION AND OTHER CONTEMPORANEOUS WRITINGS

In the Pinckney plan, which was considered by the Committee of Detail of the Constitutional Convention, one of the items reads as follows (2 Farrand, Records of the Federal Convention, 134, 135):

> The S. & H. D. in C. Ass. [Senate and House of Delegates in Congress Assembled] shall have the exclusive Power of regulating Trade and levying Imposts—Each State may lay Embargoes in Time of Scarcity

Some light on the meaning of the language which was incorporated in the Constitution is also shed by a document in Wilson's handwriting which was also apparently considered by the Committee of Detail. 2 Farrand, Records of the Federal Convention, 157. This document, which is said to be an extract from the New Jersey plan, contains the following:

> That the United States in Congress be authorized—to pass Acts for raising a Revenue,—by levying Duties on all Goods and Merchandise of foreign Growth or Manufacture imported into any Part of the United States— * * * to pass Acts for the Regulation of Trade and Commerce as well with foreign Nations as with each other *to lay and collect Taxes*

It will be noted that this document refers to the collection of duties on *"all goods."* Certainly it can at least be said that the framers of the Constitution did not contemplate that goods which might be imported by a State would be an exception.

This broad purpose of the Convention to confer upon the Federal Government exclusive power over the regulation and taxation of foreign commerce is also disclosed in numerous other writings of the time. Thus, in the diary of Ezra Stiles, it is recorded for December 21, 1787, that Mr. Baldwin, a delegate to the Convention, said that the Convention was "pretty unanimous" on several points, one of which was that the Congress was vested "with the Power of an adequate Revenue, by Customs on Trade, Excise, and direct Taxation * * *." 3 Farrand, Records of the Federal Convention, 168, 169.

Luther Martin in his "Genuine Information" delivered to the Maryland Legislature on November 29, 1787, said (3 Farrand, 172, 204):

> By the power to lay and collect imposts, they may impose duties on *any* or *every* article of *commerce* imported into these States, to what amount they please * * *. By this part of the section therefore, the Government has power to lay what duties they please on *goods imported;* * * *.

A letter written by James Madison on September 18, 1828, shows clearly the understanding of the framers of the Constitution that the powers to regulate commerce included the power to enact a protective tariff. He wrote (3 Farrand, 477):

> That the encouragement of Manufactures, was an object of the power to regulate trade,

> is proved by the use made of the power for that object, in the first session of the first Congress under the Constitution; when among the members present were so many who had been members of the federal Convention which framed the Constitution, and of the State Conventions which ratified it; each of these classes consisting also of members who had opposed & who had espoused, the Constitution in its actual form. It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them. And it may be remarked that members from Virga. in particular, as well of the antifederal as the federal party, the names then distinguishing those who had opposed and those who had approved the Constitution, did not hesitate to propose duties, & to suggest even prohibition in favor of several articles of her production; * * *.

In a letter written in 1832, Madison referred to the broad purpose of the Constitution to grant to Congress exclusive power over foreign commerce. He wrote (3 Farrand, 518, 519):

> The incapacity of the States separately to regulate their foreign commerce was fully illustrated by an experience which was well known to the Federal Convention when forming the Constitution. It was well known that the incapacity gave a primary and powerful impulse to the transfer of the power to a common authority capable of exercising it with effect.

See also the letter from James Madison to J. C. Cabell in 3 Farrand, 478.

The same thought was expressed by Madison in his draft of a "Preface to Debates in the Conven-

tion of 1787," where he wrote (3 Farrand, 539, 547):

> The want of authy. in Congs. to regulate Commerce had produced in Foreign nations particularly G. B. a monopolizing policy injurious to the trade of the U. S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg. all apprehensions of a Countervailing policy on the part of the U. States.
>
> The same want of a general power over Commerce led to an exercise of this power separately, by the States, wch. not only proved abortive, but engendered rival, conflicting and angry regulations.

The purpose of the framers of the Constitution to grant complete and unqualified authority to Congress over the subject of imports is also indicated by many passages in the Federalist. In Nos. XI and XII of the Federalist, Hamilton refers to "the importance of the Union, in a commercial light," and specifically referring to "duties on imported articles," he states that "in America, it is evident that we must a long time depend for the means of revenue chiefly on such duties." In No. XVII, Hamilton says:

> Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository.

This idea is developed further in No. XXII. There Hamilton says:

> In addition to the defects already enumerated in the existing federal system,

there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number * * *. It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. * * *

That Congress should have an exclusive and unqualified power over duties on imports was plainly indicated by Hamilton in No. XXX, where he said:

The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call *internal* and *external* taxation. The former they would reserve to the State governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the federal head * * *. Who can pretend that commercial imposts are, or would be, alone equal to the present and future exigencies of the Union?

Similarly, in No. XXXII, Hamilton wrote:

* * * I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention,

> retain that authority in the most absolute and unqualified sense; * * *.
>
> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

Hamilton then refers to the power to lay duties on imports as one which has been exclusively delegated to the United States, and then distinguishes the power to impose taxes "on all articles other than exports and imports," which he states "is manifestly a concurrent and coequal authority in the United States and in the individual States."

In No. XLII, Madison refers to "the regulation of foreign commerce" as having "been too fully discussed to need additional proofs here of its being properly submitted to the federal administration."

APPENDIX C

ADMINISTRATIVE PRACTICE

A. Published Rulings

There are listed below all published rulings by officials of the Treasury Department and decisions of the Board of General Appraisers which have been found, relating to duties on imports by or for a State or a State instrumentality. The list is undoubtedly incomplete, as the published rulings are indexed according to the article imported, without any reference to the importer. Accordingly, it has been necessary in compiling the list of rulings, to examine the indices for articles which it seems likely a State or State instrumentality might import. In the earlier volumes most of the references were found under "books"; in later volumes most of the decisions found involved "scientific apparatus."

All of the decisions labelled "Abstract" are by the Board of General Appraisers until 1925, and by the Customs Court after that date. The other rulings are by Treasury officials or by the Board of General Appraisers, as indicated in each case. All of the rulings prior to 1891 were made by officials of the Treasury Department.

In Synopsis 2549, Synopsis of Decisions (1875) 430, the Secretary of the Treasury ruled that cer-

tain engravings imported by the Public Library of Boston were entitled to free entry on the ground that they constituted an unbound book imported for philosophical or religious purposes. A few days later in Synopsis 2567, Synopsis of Decisions (1875) 446, the Secretary considered another case involving the Boston Public Library and held that the statute then in effect allowed the library to import only two copies on any one invoice, and not two copies for each branch of the library as it had contended.

In Synopsis 4663, Synopsis of Decisions (1880) 301, the Department ruled that books imported by the Philadelphia Public Library free of duty became dutiable if surplus copies of them were thereafter sold.

Synopsis 7500, Synopsis of Decisions (1886) 192, involved the application of the City of New Orleans for free entry of blocks of Mexican marble presented to the city by the Mexican government, intended for the decoration of a city park. The application was denied. The ruling follows in full:

> TREASURY DEPARTMENT, *May 5, 1886.*
>
> SIR: The Department is in receipt of your letter of the 30th ultimo, in which you submit the application of the mayor of New Orleans, per E. L. Bower, chief clerk, for the free entry of certain blocks of Mexican marble which have been presented to the city of New Orleans by the Mexican Government, and are intended for the decoration of the city park.
>
> In reply, I have to inform you that the only articles which are exempt from duty when imported for presentation to municipal corporations are specified in paragraph

819, act of March 3, 1883, as follows, viz: "Paintings, statuary, fountains, and other works of art."

The blocks of marble in question are not embraced among these articles, and the Department is therefore unable to grant the application.

Respectfully yours,

C. S. FAIRCHILD,
Acting Secretary,
Collector of Customs, New Orleans, La.

In Synopsis 8465, Synopsis of Decisions (1887) 489, the Treasury denied a request for the free entry of instruments for making the measurements used in the Bertillon system of criminal identification, imported for the use of certain penitentiaries. The request was denied on the ground that the instruments were subject to duty under existing laws.

In Synopsis 8540, Synopsis of Decisions (1887) 545, the Treasury Department held that certain designs for a monument to be erected by the State of Indiana were entitled, as a matter of construction of the statute, to free entry.

In Synopsis 8558, Synopsis of Decisions (1887) 557, it was held as "a fair construction of the law" that books imported by the library of an appellate court of Illinois were exempt from duty. No question of constitutional power was raised.

Synopsis 9736, Synopsis of Decisions (1889) 581, involved an application for a refund of duty levied on microscope cover glasses imported for the University of Michigan. The application was allowed on the ground that the merchandise came within the provision for free entry allowed to philosophical and scientific apparatus.

In Synopsis 9748, Synopsis of Decisions (1889) 595, application was made by the Board of Education of the State of Connecticut for relief from the payment of duties assessed on certain maps. Two copies had been admitted free, leaving the remaining number subject to duty. The Department held that the assessment of duty on the excess over two was correct.

In Synopsis 10845, 1 Synopsis of Decisions (1891), 267, electric batteries imported by the Iowa Hospital for the Insane were held subject to duty because the hospital was not instituted for any of the purposes specified in paragraph 677 of the Tariff Act of 1890 allowing free entry of scientific apparatus imported for the use of any society or institution established "for religious, philosophical, educational, scientific, or literary purposes."

In Synopsis 11045, 1 Synopsis of Decisions (1891) 451, it was held by the Board of General Appraisers that celluloid labels for plants imported by the Missouri State Botanical Gardens were not entitled to free entry as philosophical instruments and apparatus.

In Synopsis 13428, 2 Synopsis of Decisions (1892) 1150, olive oil machines imported by the University of California were held subject to duty over the objection that they were "philosophical and scientific apparatus." The decision was by the Board of General Appraisers.

In Synopsis 13777, Synopsis of Decisions (1893) 182, free entry of oculists' lenses imported by the Maine Eye and Ear Infirmary was denied by the Board of General Appraisers. (This institution was incorporated under the laws of Maine, but it

does not affirmatively appear that it was a State instrumentality.)

In Synopsis 14381, Synopsis of Decisions (1893) 768, absolute alcohol imported for the use of the University of Pennsylvania was held by the Board of General Appraisers to be entitled to free entry as a scientific preparation.

In Synopsis 14725, Synopsis of Decisions (1894) 145, a model ice machine imported by the Alabama Agricultural College was held entitled to free entry as a philosophical or scientific apparatus. The decision was by the Board of General Appraisers.

In Synopsis 15237, Synopsis of Decisions (1894) 597, certain drawing instruments imported for the use of the public schools in Cambridge, Massachusetts, were claimed to be exempt from duty as scientific instruments. The Board of General Appraisers held that they were not scientific instruments and were dutiable.

In Synopsis 16230, Synopsis of Decisions (1895) 682, the Board of General Appraisers held that antitoxin imported by the City of Chicago for free distribution by its health department was not entitled to free entry, because the City of Chicago was not a society or institution of the kind described in the Tariff Act.

In Synopsis 16247, Synopsis of Decisions (1895) 697, the Department ruled that the High School of East Orange, New Jersey, was established for the encouragement of art and sciences, and was consequently entitled to import certain photographs free of duty.

In Synopsis 16441, Synopsis of Decisions (1895) 867, the Department ruled that sheep imported by

the Iowa Agricultural College for "scientific investigation" were subject to duty because the statute allowed free entry of animals only when "imported specially for breeding purposes."

In Synopsis 18156, Synopsis of Decisions (1897) 579, the Board of General Appraisers held that the Minnesota State Board of Health and the St. Paul City and County Hospital were educational and scientific institutions so that certain scientific apparatus and preparations which they imported were entitled to free entry.

Synopsis 18797, 1 Synopsis of Decisions (1898) 40, and T. D. 22079, 3 Treas. Dec. 257 (1900), involved importations of books by public libraries, the Philadelphia Free Library and the Plymouth County Law Library Association, Plymouth, Massachusetts, which were supported by public funds. In both cases the Board of General Appraisers held that the books were entitled to free entry as a matter of the construction of the statute.

Another case involving the Minnesota State Board of Health is Synopsis 19112, 1 Synopsis of Decisions (1898) 431, where the Department held the merchandise was not entitled to free entry because the importer had not complied with the regulation requiring that an affidavit showing the basis for the exemption be filed within seven days before the arrival of the merchandise.

T. D. 22281, 3 Treas. Dec. 510 (1900), known as Circular No. 87, is a compilation of the statute, regulations and rulings of the Department relating to the free importation of articles for institutions. It digests many of the rulings referred to above. T. D. 24502 and T. D. 24503, 6 Treas. Dec. 520, 522,

(1903), are similar compilations of the statute, regulations and rulings. T. D. 24536 and T. D. 24537, 6 Treas. Dec. 576, 580 (1903), are revisions of this Circular containing references to additional rulings.

T. D. 22938, 4 Treas. Dec. 359 (1901)—University of the State of New York—Department ruling—free entry of books allowed without filing an oath that the books were the "permanent property" of any particular branch.

Abstract 121, 7 Treas. Dec. 109 (1904)—New York State Cancer Laboratory—Scientific apparatus held dutiable.

Abstract 816, 7 Treas. Dec. 488 (1904)—Lyons Township High School, Lagrange, Illinois; High School, St. Louis, Mich; North Carolina Department of Agriculture; New York Agricultural Station; Connecticut Agricultural Experiment Station—scientific apparatus held dutiable for want of evidence that the institutions came within the exemption provision.

Abstract 897, 7 Treas. Dec. 558 (1904)—Washington State Agricultural College Experiment Station and School of Science—scientific apparatus allowed free entry.

Abstract 1643, 7 Treas. Dec. 881 (1904)—Connecticut Agricultural College—scientific apparatus held dutiable for want of evidence as to the character of the institution.

Abstract 1850, 7 Treas. Dec. 966 (1904)—University of Minnesota; University of Oklahoma; University of South Dakota; University of Wisconsin; Indiana University—scientific apparatus allowed free entry.

Abstract 2403, 8 Treas. Dec. 132 (1904)—University of Minnesota—scientific apparatus allowed free entry.

Abstract 2505, 8 Treas. Dec. 157 (1904)—University of Cincinnati—scientific apparatus allowed free entry.

T. D. 26834, 10 Treas. Dec. 511 (1905)—Board of Education of the City of New York—Board of General Appraisers decision—lantern slides allowed free entry over the objection that the Board of Education was a subdivision of the city and not a "society or institution" within the meaning of paragraph 638 of the Tariff Act of 1897.

Abstract 11208, 11 Treas. Dec. 682 (1906)—Connecticut Agricultural Experiment Station—scientific apparatus allowed free entry.

Abstract 22176, 18 Treas. Dec. 305 (1909)—Board of Education of the City of Chicago—enameled ware, consisting of pails, pans, and basins, held not scientific apparatus and therefore dutiable.

Abstract 15830, 13 Treas. Dec. 869 (1907)—Minnesota State Dairy and Food Commission—held not established solely for educational and scientific purposes, so that a scientific instrument was not entitled to free entry.

Abstract 23515, 19 Treas. Dec. 664 (1910)—High School of Columbus, Texas—scientific instruments held entitled to free entry.

Abstract 26392, 21 Treas. Dec. 168 (1911)—University of Kansas—container of acid held entitled to free entry as usual covering of merchandise entitled to free entry—affirmed in *United States* v. *Wyman & Co.*, 2 Ct. Cust. App. 440, T. D. 32200, 22 Treas. Dec. 119 (1912).

Abstract 33236, 25 Treas. Dec. 96 (1913)—Boston Trade School for Girls; Board of Education of the City of New York—sewing machine and scissors for teaching sewing held free of duty as scientific apparatus—affirmed in *United States* v. *Kastor & Bros.*, 6 Ct. Cust. App. 52, T. D. 35323, 28 Treas. Dec. 613 (1915).

Abstract 33857, 25 Treas. Dec. 270 (1913)—Board of Education of New York City—scissors held entitled to free entry.

Abstract 34482, 26 Treas. Dec. 40 (1914)—University of Washington—protest against duty on maps overruled for failure to comply with the regulations.

Abstract 38687, 29 Treas. Dec. 451 (1915)—Board of Education of New York City—protest against duty on scissors overruled for failure to comply with the regulations.

Abstract 38843, 29 Treas. Dec. 573 (1915)—Board of Education of New York City—scissors held entitled to free entry.

Abstract 47140, 45 Treas. Dec. 943 (1924)—University of California—protest overruled for failure to comply with the regulations.

Abstract 50335, 48 Treas. Dec. 728 (1925)—University of Michigan—goat skins for book binding held dutiable; this is apparently the first case in which the constitutional question was raised.

T. D. 43023, 54 Treas. Dec. 319 (1928)—University of Illinois—scientific apparatus held dutiable against objections on constitutional grounds—appeal to Court of Customs Appeals dismissed, Abstract 8176, 55 Treas. Dec. 1063 (1929).

Abstract 8042, 55 Treas. Dec. 1042 (1929)—University of Michigan—scientific instruments held dutiable against constitutional objections.

Abstract 9080, 56 Treas. Dec. 707 (1929)—University of Michigan—scientific instruments held dutiable against constitutional objections.

Abstract 10620, 57 Treas. Dec. 1013 (1930)—University of Illinois—copies of old coins and scientific instruments held dutiable against constitutional objections—rehearing granted, Abstract 10804, 57 Treas. Dec. 1044 (1930).

T. D. 44758, 59 Treas. Dec. 747 (1931)—University of Illinois—scientific apparatus held dutiable against constitutional objections—affirmed in *University of Illinois* v. *United States,* T. D. 45773, 61 Treas. Dec. 1334 (1932), the present case.

Abstract 19901, 61 Treas. Dec. 1605 (1932)—University of Illinois—protest based on constitutional grounds overruled.

B. Unpublished Rulings

The Treasury Department has also made numerous similar rulings which have not been published. Some of these will be briefly summarized here. On May 23, 1906, J. B. Reynolds, Assistant Secretary of the Treasury, in a letter to the Collector of Customs at Boston, Massachusetts, held that a gas burner and chimney imported by the Gas and Electric Lighting Commission of the Commonwealth of Massachusetts for research and experimental purposes was not entitled to free entry. (*Infra,* pp. 58–59.) On November 5, 1909, C. D. Hilles, Acting Secretary of the Treasury, in a letter to F. W. Rane, State Forester of Massachusetts, held that there was no authority to allow the free entry of

arsenate of lead paste for the use of the Commonwealth of Massachusetts in destroying gypsy moths. (*Infra,* p. 59.) On January 23, 1912, A. Piatt Andrew, Assistant Secretary of the Treasury, in a letter to Senator Briggs of New Jersey, informed the Senator that merchandise imported by the New Jersey State Village for Epileptics did not come within the provisions of the Tariff Law providing for free entry. (*Infra,* pp. 60–61.) On March 9, 1922, A. W. Mellon, Secretary of the Treasury, in a letter to John M. Parker, Governor of Louisiana, replied to the Governor's request that the Department reconsider its decision of February 28, holding that cement and similar material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges, was not entitled to free entry. The Secretary stated that he was unable to direct the free entry "of such material as is included in the dutiable list of the Tariff Act of 1913." (*Infra,* pp. 61–62.)

On March 7, 1924, McKenzie Moss, Assistant Secretary of the Treasury, wrote Herbert Levy, Assistant Attorney General of Maryland, stating that "it has accordingly been the long established practice of the Department to approve the assessment of duty on articles imported for the use of a state provided they were not exempted from duty by some provision of the free list of the tariff act, and this practice, while not questioned on a constitutional ground, was upheld by the Board of United States General Appraisers." (*Infra,* pp. 62–63.)

On March 15, 1928, Frank Dow, Acting Commissioner of Customs, in a letter to Senator Stei-

wer, stated that the Department knew of no reason why certain tow machines, imported by the State flax industry for the exclusive use of the State of Oregon, should be treated any differently than merchandise of any other importer. (*Infra,* pp. 63–64.)

On March 29, 1928, Mr. McNary introduced S. 3823, which was a bill "to remit the duty on machinery imported by the State of Oregon for the use of the State flax industry." (*Infra,* p. 65.) With reference to this bill Carl T. Schuneman, Acting Secretary of the Treasury, wrote the Chairman of the Senate Finance Committee, stating that he favored general rather than special legislation in such matters, but making no recommendation on the bill since it involved a matter within the discretion of Congress. (*Infra,* pp. 65–67.) The bill was not reported out of the Committee on Finance.

Text of Unpublished Rulings, Etc., Referred to in this Appendix

MAY 23, 1906.

The COLLECTOR OF CUSTOMS,
Boston, Mass.

SIR: Referring to your letter of the 10th instant, relative to the free entry of a certain gas burner and chimney, imported by the Gas and Electric Lighting Commission of the Commonwealth of Massachusetts, for research and experimental purposes, I have to inform you that the Collector of Customs at New York reports that the free entry of said articles was denied at that port for the reason that it did not appear that the same were imported for the use and by the order of any society or institution incorporated or established solely for religious, philosophi-

cal, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use or by the order of any school, academy, or seminary of learning in the United States, which action meets with the Department's approval.

T. D. 26834, of November 2, 1905, cited by you, is not applicable to the importation in question, for the reason that the goods under consideration in that decision, were imported by the Board of Education of the city of New York for use in the public schools in that city.

Your attention is invited to T. D. 16230, of June 6, 1895, in which it is held that articles imported for the municipality of the city of Chicago, are not entitled to free entry under the provisions of paragraph 638 of the Act of 1897.

Respectfully,
(Signed) J. B. REYNOLDS,
Assistant Secretary.

NOVEMBER 5, 1909.

Mr. F. W. RANE,
State Forester, State of Massachusetts,
6 Beacon Street, Boston, Mass.

SIR: In reply to your letter of the 19th ultimo, I have to state that there is no authority of law for the free entry of arsenate of lead paste for the use of the Commonwealth of Massachusetts against the gypsy moths, etc. Duty would have to be collected on the article, and probably at the rate of twenty-five per centum ad valorem, under paragraph 3 of the tariff of 1909, as a chemical compound.

Respectfully,
(Signed) C. D. HILLES,
Acting Secretary.

JANUARY 23, 1912.

Honorable FRANK O. BRIGGS,
United States Senate.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant in regard to the free entry of articles for the New Jersey State Village for Epileptics at Skillman, New Jersey.

The only provisions of law under which free entry for this institution could be granted are paragraphs 519 and 650 of the existing tariff act, which limit the free entry to articles imported for institutions established *solely* for religious, philosophical, educational, scientific, and literary purposes. The Board of United States General Appraisers held, on June 12, 1900 (Treasury Decision No. 22279), that a hospital with incidental educational features is not an institution incorporated or established solely for educational purposes nor a college, academy, school, or seminary of learning. The decision of the United States Circuit Court of Appeals in *Massachusetts General Hospital* v. *the United States,* 112 Fed. Rep. 670, affirmed the Board's decision. Following these decisions the Department has refused free entry to articles imported for the use of Letchworth Village of Thiells, New York, which was established for the custodial care of epileptics of unsound mind and other feeble-minded people, holding that the educational features of the institution are merely incidental.

If the New Jersey State Village for Epileptics is an institution similar to that established under the New York State laws the Department would be constrained to rule

that it is not entitled to the privilege of free entry under said paragraphs.

Respectfully,

(Signed) A. PIATT ANDREW,
Assistant Secretary.

MARCH 9, 1922.

Honorable JOHN M. PARKER,
Governor of Louisiana,
Baton Rouge, La.

MY DEAR GOVERNOR: The Department is in receipt of your letter of the 4th instant, further in regard to the importation of cement and similar material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges, which will represent the joint work of your state and the United States Government.

You request a careful reconsideration of the Department's decision of February 28th, holding that articles or materials are not entitled to admission free of duty because imported for the use of a state government.

As under the Tariff laws of the United States all articles are subject to duty unless specially exempted therefrom by some provision of law, the Department is vested with no discretionary power under which it may make a favorable ruling in the case under consideration. The interest of the Federal Government in the building of bridges within the state can not operate to relieve the state from the payment of duty, as material imported for the use of the United States Government is subject to duty in the absence of exemption by express provision of law.

I regret that I am, therefore, unable to direct the free entry for the purposes mentioned of such material as is included in the dutiable list of the Tariff Act of 1913.

Very truly yours,
(Signed) A. W. MELLON, Secretary.

MARCH 7, 1924.

MR. HERBERT LEVY,
Assistant Attorney General,
State Law Department,
Baltimore, Md.

SIR: The Department is in receipt of your letter of January 23rd last, relative to the right of the State of Maryland to import scientific apparatus without the payment of duty. You state that you have reached the conclusion that merchandise imported by a state is not properly subject to the provisions of the tariff laws and you request a discussion of the Department's ruling of January 10th with a view to avoiding litigation on the question.

As it is not the function of the Department to determine the constitutionality of the tariff act as relating to the importation of merchandise by State Governments, it appears that discussion of this phase of the question would serve no good purpose. The intent of Congress to authorize the assessment of duties on such importations is evidenced by the fact that it has expressly exempted from duty books and certain other articles imported for State Libraries.

It has accordingly been the long established practice of the Department to approve the assessment of duty on articles imported for the use of a state provided they were not exempted from duty by some pro-

vision of the free list of the tariff act, and this practice, while not questioned on a constitutional ground, was upheld by the Board of United States General Appraisers in T. D. 13428, T. D. 16230, and T. D. 28278, abstract 15830. The Department is of course without authority to direct the free entry of articles made dutiable by an Act of Congress in the absence of a judicial decision declaring such enactment to be unconstitutional.

If you desire to secure a judicial determination of the question it is suggested that you file, in accordance with the provisions of section 514 of the Tariff Act of 1922, a written protest against the assessment of duty on an entry filed in the name of the state, if such an entry is now pending, and the matter will then be given consideration by the Board of United States General Appraisers.

Respectfully,

(Signed) McKenzie Moss,
Assistant Secretary.

March 15, 1928.

Honorable Frederick Steiwer,
United States Senate.

My dear Senator: I am in receipt of your letter of the 12th instant, enclosing a communication from the Superintendent of the State Flax Industry addressed to you under date of the 6th idem, in which for the reasons advanced in his letter he expresses the opinion that an Etrich tow machine if imported for the exclusive use of the State of Oregon would be entitled to admission free of duty.

The Department is aware of no provision of law which would authorize the treatment

for customs purposes of merchandise imported by a state differently than for merchandise of any other importer, and as Congress has not authorized the free entry of machines of the character under consideration in the Free List of the tariff act they are subject to duty. It is not quite clear from the letter of Mr. Meyers just what would be the proper rate of duty to assess upon the machine. Paragraph 372 of the tariff act provides that textile machinery or parts, finished or unfinished, shall be subject to duty at the rate of 35% ad valorem and if the Etrich tow machine is used in the preparation of flax for the spinning of yarn or the preparation of material for use in the weaving of flax, it would be dutiable at the rate of 35% ad valorem. Otherwise it would be dutiable at the rate of 35% ad valorem under the last provision of paragraph 372 which provides that rate on machines, not specially provided for.

I am enclosing a copy of the tariff act of 1922 so that if you desire you may send the same to Mr. Meyers for his further information.

Very truly yours,
(Signed) FRANK DOW,
Acting Commissioner of Customs.

S. 3823

70TH CONGRESS
1ST SESSION

IN THE SENATE OF THE UNITED STATES

MARCH 27 (calendar day, MARCH 29), 1928

Mr. MCNARY introduced the following bill; which was read twice and referred to the Committee on Finance

---

A BILL

To remit the duty on machinery imported by the State of Oregon for the use of the State flax industry.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to admit free of duty any machinery for the preparation of flax or flax fiber for manufacture or the manufacture of linen cloth from flax or flax fiber that may be imported by the State of Oregon for the use of the State flax industry.

APRIL 9, 1928.

DEAR MR. CHAIRMAN: I am in receipt of a letter dated the 31st ultimo, requesting that your committee be furnished with a report on the merits of S. 3823, a bill to remit the

duty on machinery imported by the State o
Oregon for the use of the State flax industry

The bill provides for the admission fre
of duty of any machinery for the prepara
tion of flax or flax fiber for manufacture o
the manufacture of linen cloth from flax o
flax fiber that may be imported by the Stat
of Oregon for the use of the State flax in
dustry.

An application of the Secretary of th
Oregon State Board of Control for the fre
entry of certain machinery of this characte
was submitted to the Department by the col
lector of customs at Portland, Oregon, unde
date of the 6th ultimo, and the Departmen
declined to authorize its admission withou
the payment of duty for the reason that tex
tile machinery not specially provided fo
is dutiable at the rate of 35% ad valoren
under paragraph 372 of the tariff act and
that Congress has not authorized the specia
treatment of articles of this character im
ported by or for the use of a state govern
ment. That it was intended that state gov
ernments should pay duty unless specially
exempted therefrom is evidenced by the pro
visions in the Free List of the tariff act fo
books for State libraries and works of art
and similar articles for exhibition by a State.

The Department has necessarily denied
many applications for the free entry of arti
cles imported for the various State govern
ments, and I know of no special circum
stances in this case which would differenti
ate it from the cases above mentioned. I
am inclined to favor general rather than
special legislation in matters of this kind,
but as the question is one entirely within the
discretion of the Congress I do not deem it
advisable to make a recommendation on the

merits of the bill. It is believed that the bill, if passed in its present form would involve no unusual administrative difficulties.

Very truly yours,

(Signed) CARL T. SCHUNEMAN,
Acting Secretary of the Treasury.

Honorable REED SMOOT,
Chairman, Committee on Finance,
U. S. Senate.

U. S. GOVERNMENT PRINTING OFFICE : 1933